Decision

in case 1689/2016/MDC on the Commission's failure to reply in a satisfactory manner to an infringement complaint against Ireland

The case was brought by an Irish organisation called the Dhuish Environmental Group. It concerned the European Commission's alleged failure to reply in a satisfactory manner to the Group's complaint against Ireland concerning its compliance with the provisions of EU law on the planning of wind farms in Ireland. In particular, the complainant contended that decisions on applications for individual wind farms should be preceded by a strategic environmental assessment (SEA) but that no such SEAs had been carried out in the case of 20 applications of which it is aware.

The Ombudsman inquired into the issue. She found that the Commission had committed no manifest error of assessment and that the complainant's allegation could not be sustained. In particular, the Ombudsman found that the requirement for an SEA arises only where the application in question is made in the context of overarching "plans and programmes" drawn up by national authorities. In this case, the applications mentioned by the complainant were individual applications and were not made within the context of overarching "plans and programmes". The Ombudsman therefore closed the case with a finding of no maladministration.

The background to the complaint

1. The complainant, an Irish organisation called the Dhuish Environmental Group, submitted an infringement complaint to the European Commission against Ireland on 2 February 2015[1]. It contended that Ireland was in breach of Article 3 of Directive 2001/42/EC (the Strategic Environmental Assessment

[1] The complainant had submitted an infringement complaint to the Commission on the same subject matter on 16 July 2014. However, at the time, the Commission had told the complainant that it should first raise the matter with the Irish authorities, which it did. Since the complainant was dissatisfied with the reply of the Irish authorities, it submitted the infringement complaint to the Commission again on 2 February 2015. The complaint had been sent by post and it appears never to have reached the Commission. The Commission became aware of the infringement complaint on 17 March 2016, when the complainant re-sent the infringement complaint by e-mail.

1 avenue du Président Robert Schuman
CS 30403
F - 67001 Strasbourg Cedex

T. + 33 (0)3 88 17 23 13
F. + 33 (0)3 88 17 90 62

www.ombudsman.europa.eu
eo@ ombudsman.europa.eu

('SEA') Directive')[2]. This was because over the 15 years preceding its complaint, 20 planning applications had been submitted to Cavan County Council for wind farm projects and no SEA had been carried out for any of these wind farms. Specifically, the complainant asked the Commission whether an SEA is "*mandatory for 'energy developments' ie: wind farms.*"

2. The Commission replied on 4 April 2016 (hereinafter the 'Commission's first reply). It stated that the SEA Directive requires that an environmental impact assessment be carried out for certain plans and programmes which are likely to have significant environmental effects, including all plans and programmes prepared for such purposes as energy, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC[3] (the Environmental Impact Assessment ('EIA') Directive) or which, in view of the likely effects on sites, have been determined to require an assessment in accordance with Articles 6 or 7 of Directive 92/43/EEC[4] (the Habitats Directive).

3. After reproducing the definition of 'plans and programmes' provided in Article 2 of the Directive, the Commission said that in Ireland, this definition would cover "*things like County Development Plans, Local Area Plans or national planning policy*." The Commission stated that in order for plans and programmes to be subject to the Directive, they must therefore set the framework for future development consent and must be required and be subject to adoption as set out in Article 2(a). The Commission added that the complainant described 20 separate planning applications for wind farm development in the area. However, it did not provide any evidence of any overarching plan or programme which set the framework within which those planning applications were to be considered and which was required by national legislative, regulatory or administrative provisions.

4. The Commission considered that the SEA Directive does not require Member States to prepare plans or programmes. Therefore, where no such plan or programme exists, the SEA Directive does not apply. According to the Commission, "*it is not therefore the case that an SEA is mandatory for all energy developments*". The Commission concluded that, on the basis of the information provided by the complainant, it did not appear that the SEA Directive was "*engaged*" in this case. Therefore, it considered that it was not appropriate to open a formal complaint.

5. The complainant replied to the Commission that, in accordance with Directive 2009/28/EC[5] (the 'Renewable Energy Directive'), Ireland is committed to producing at least 16% of all energy consumed by 2020 from renewable sources. However, Ireland had not carried out an SEA for the renewable energy

[2] Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, OJ 2001 L197, p. 30.
[3] Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, OJ 1985 L175, p. 40.
[4] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ 1992 L 206, p. 7.
[5] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ 2009 L 140, p. 16.

programme in Ireland. The complainant stated that this was the fundamental reason for its complaint to the Commission. It contended that an SEA was required, in accordance with Article 3 of the SEA Directive and the provisions of the relevant national implementing legislation. It added that "*the SEA would also have to be subject to an Appropriate Assessment, under the provisions of the Habitats Directive 92/43/EEC*" and the relevant national implementing legislation.

6. The complainant ended its letter with the following question: "*could the Commission identify if Ireland in accordance with Article 13(4) of the SEA Directive notified the Commission that wind farms are not covered by the SEA Directive because they* ***are not likely to have significant environmental effects***."

7. In the Commission's reply of 26 April 2016 (hereinafter the 'Commission's second reply'), the institution stated that it was in the process of holding discussions with the Irish Government about its plans for wind energy development at the national level. It went on to state that the Commission had considered in some detail Ireland's National Renewable Energy Action Plan, prepared under the Renewable Energy Directive. Whilst no formal SEA had been carried out for this plan, the Commission concluded that there was no reason to believe that insufficient public participation had taken place prior to its adoption.

8. The Commission pointed out that it enjoys wide discretion in deciding whether to bring enforcement proceedings. It added that it is under no duty to bring such proceedings and that they do not automatically follow from every complaint.

9. The Commission stated that it has raised with the Irish authorities "*the issue of the wider planning framework (at strategic and/or local levels) for the electricity transmission and distribution network, particularly as it relates to wind farms*". It has asked the authorities to indicate how Ireland is ensuring compliance with the SEA Directive. The Commission added that once it receives a response to its questions, it will decide whether any further action is necessary.

10. In reply to the complainant's question, the Commission stated that Article 13(4) of the SEA Directive does not require Member States to notify the Commission of the types of plans and programmes which they consider not to be covered by the SEA Directive, but rather the types of plans and programmes which are covered by it. It stated that the Commission is not aware of any notification of the type described by the complainant. The Commission stated that since the Commission has raised the matter with the Irish authorities, there was no need to open a new complaint file on this matter.

The inquiry

11. The complainant submitted a complaint to the Ombudsman on 9 November 2016. The Ombudsman opened an inquiry into the allegation that the Commission failed to reply in a satisfactory manner to the complainant's complaint against Ireland concerning its compliance with the provisions of EU law on the planning of wind farms in Ireland.

12. In the course of the inquiry, the Ombudsman duly considered the information provided in the complaint. In particular, she carried out a thorough analysis of the correspondence that had taken place between the Commission and the complainant before the complainant turned to the Ombudsman.

Alleged failure to reply in a satisfactory manner to the complainant's complaint against Ireland

Arguments presented to the Ombudsman

13. The complainant contended that Ireland constantly breaches European laws and directives with regard to the planning and building of wind farms in Ireland. Specifically, the complainant referred to a lack of adherence to the SEA Directive, the EIA Directive, the Aarhus Convention[6] and the Public Participation Directive[7].

14. The complainant considered that "*until very recently the SEA Directive concerning Energy has not been followed in Ireland. With regard to energy and wind farms there is still no SEA for Energy in Ireland. It is only from a recent ECJ judgement in Belgium, (Case C-290/15* [delivered on 27/10/2016[8]]*), that the law regarding SEA for wind farms has been properly implemented.*" It contended that the Commission has "*a somewhat distorted approach to implementing the SEA Directive in Ireland*". According to the complainant, the Commission has advised it that the SEA Directive does not apply in Ireland and that it does not refer to the complainant's particular cause regarding wind farms. The complainant considered that the judgement of the Court of Justice of the EU (CJEU) now proves that the complainant had properly interpreted the SEA Directive and that the Commission had been deliberately misleading in its assessment of the application of the SEA Directive in Ireland.

15. The complainant stated that it has been advised on several occasions that letters would be written to the Irish Government asking why these laws and directives are not being implemented but it never receives a satisfactory answer as to why no action is ever taken to redress the situation.

The Ombudsman's assessment

16. The Ombudsman's assessment will focus on the Commission's replies to the complainant's complaint about the alleged breach of the SEA Directive by

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[6] The Aarhus Convention was approved on behalf of the European Union by virtue of Council Directive 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, OJ 2005, L 123, p. 1.

[7] Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, OJ 2003 L 156, p. 17.

[8] Judgment of the Court of Justice of 27 October 2016, *D'Oultremont and others*, C-290/15, ECLI:EU:C:2016:816.

Ireland, since it was this Directive that was mentioned in the complainant's correspondence with the Commission.

17. The relevant provisions of the SEA Directive are:

Article 2

"(a) 'plans and programmes' ... shall mean plans and programmes ...

- which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and

- which are required by legislative, regulatory or administrative provisions."

Article 3

"1. An environmental assessment, in accordance with Articles 4 to 9, shall be carried out for plans and programmes referred to in paragraphs 2 to 4 which are likely to have significant environmental effects.

2. Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes,

(a) which are prepared for ... energy, ... town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC, or

(b) which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC.

...

4. Member States shall determine whether plans and programmes, other than those referred to in paragraph 2, which set the framework for future development consent of projects, are likely to have significant environmental effects.

5. Member States shall determine whether plans or programmes referred to in paragraphs 3 and 4 are likely to have significant environmental effects either through case-by-case examination or by specifying types of plans and programmes or by combining both approaches. For this purpose Member States shall in all cases take into account relevant criteria set out in Annex II, in order to ensure that plans and programmes with likely significant effects on the environment are covered by this Directive."

Article 13

"4. Before 21 July 2004, Member States shall communicate to the Commission, in addition to the measures referred to in paragraph 1, separate information on the types of plans and programmes which, in accordance with Article 3, would be subject to an environmental assessment pursuant to this Directive. The Commission shall make this information available to the Member States. The information will be updated on a regular basis."

18. The Ombudsman points out that, as far as her role in investigating infringement complaints against the Commission is concerned, her mandate is limited to examining whether the Commission acted diligently when examining the infringement complaint submitted to it. The Ombudsman can intervene only if a **manifest error** in the Commission's overall assessment is identified.

The Commission's first reply

19. In its first reply, the Commission pointed out that the complainant described 20 separate planning applications for wind farm development in a particular area. However, it did not provide any evidence of any overarching plan or programme which set the framework within which those planning applications were to be considered and which was required by national legislative, regulatory or administrative provisions.

20. Having read the complaint made to the Commission, the Ombudsman considers that the Commission's conclusion, that the complainant described 20 separate planning applications and not a 'plan or programme' within the meaning of the SEA Directive, is correct. Nor did the complainant describe any instrument which could be considered to be equivalent to the regulatory order which was at issue in the the judgment of the Court of Justice in Case *D'Oultremont and others*, C-290/15, which the complainant mentioned in its complaint to the Ombudsman[9].

21. The complainant considers that the Commission has advised it that the SEA Directive does not apply in Ireland and that it does not refer to the complainant's particular case regarding wind farms. The complainant appears

[9] Judgment of the Court of Justice of 27 October 2016, *D'Oultremont and others*, C-290/15, ECLI:EU:C:2016:816. In that case, the Court was called upon to give a preliminary ruling on an issue which arose in the course of an action for annulment lodged before a Belgian court. The applicants were seeking to annul a regulatory order of the Walloon Government "*on sector-specific conditions for wind farms of a total power of at least 0.5 MW*". The order covered issues such as lighting in wind farm sites, limits on the effects of 'shadow flicker' arising from the operation of wind turbines and limits on the noise emissions from wind farms.
The referring court was unsure of whether the provisions of the regulatory order in question constituted "*plans and programmes*" within the meaning of the SEA Directive. It considered that the order did not set out a 'complete framework' (that is, a set of coordinated measures governing the operation of wind farms with a view to protecting the environment). However, the referring court explained that the consideration, during the issuing of authorisations, of the provisions of the order concerning noise and the effects of shadow flicker produced by the functioning of the wind turbines necessarily had the consequence of determining the location of the wind turbines in relation to housing.
The Court of Justice considered that the regulatory order in question was prepared and adopted by a regional authority (the Walloon Government) and that it was required by the provisions of a Decree of the Walloon Government (see Article 2(a) of the SEA Directive). Moreover, the order concerned the energy sector and it helped to define the framework for the implementation, in the Walloon Region, of wind farm projects which form part of the projects listed in Annex II to the SEA Directive (see Article 3(2)(a) of the SEA Directive). The Court considered that the notion of 'plans an programmes' relates to any measure which establishes, by defining rules and procedures for scrutiny applicable to the sector concerned, a significant body of criteria and detailed rules for the grant and implementation of one or more projects likely to have significant effects on the environment. In this case, the order in question set standards which determined the conditions under which actual projects for the installation and operation of wind turbine sites could be authorised in the future.
The Court held that Articles 2(a) and 3(2)(a) of the SEA Directive must be interpreted as meaning that a regulatory order, such as that at issue in the main proceedings, containing various provisions on the installation of wind turbines which must be complied with when administrative consent is granted for the installation and operation of such installations comes within the notion of 'plans and programmes', within the meaning of that directive.

to misinterpret the Commission. What the Commission said was that the SEA Directive does not require Member States to prepare plans or programmes and that where no such plan or programme exists, the SEA Directive does not apply. According to the Commission, "*it is not therefore the case that an SEA is mandatory for all energy developments*".

22. This appears to be a correct interpretation of the SEA Directive. Indeed, the SEA Directive applies once a Member State decides to prepare a plan or programme covered by the Directive but it does not oblige Member States to draw up such plans or programmes. The Commission was not implying that the SEA Directive does not apply to Ireland but rather that it becomes applicable once Ireland draws up plans and programmes that fall under it. The complainant did not put forward evidence of the existence of any such plan or programme. Thus, the Commission was right to say that the SEA Directive was not "engaged" in this case.

The Commission's second reply

23. The Ombudsman considers that the Commission's comments concerning Ireland's National Renewable Energy Action Plan must be read in light of the fact that it is in the process of holding discussions with the Irish authorities about "*the issue of the wider planning framework ... for the electricity transmission and distribution network, particularly as it relates to wind farms*".

24. Ireland was required to draw up a National Renewable Energy Action Plan by Article 4 of the Renewable Energy Directive. It appears that the Commission referred to this Action Plan because, arguably, it falls into the category of "plans and programmes" provided for at Article 2 of the SEA Directive. Having examined the National Renewable Energy Action Plan which the Irish authorities submitted to the European Commission in July 2010, the Ombudsman notes that, following an initial targeted consultation on the first version of the Action Plan, a public consultation was held with regard to the draft Action Plan. The Commission considered that although no formal SEA had been carried out for this Action Plan, sufficient public consultation had taken place prior to its adoption. It did not consider it necessary to commence infringement proceedings against Ireland on this issue. However, it is in the process of holding discussions with the Irish authorities on the matters mentioned above and it will decide on the necessity of taking further action once it receives the Irish authorities' reply to the question as to how Ireland is ensuring compliance with the SEA Directive.

25. The Ombudsman considers that the Commission has given a reasonable explanation as to why it decided not to commence infringement proceedings against Ireland for the lack of an SEA concerning the Action Plan but, rather, to hold discussions on the issue of the wider planning framework for the electricity transmission and distribution network, particularly as it relates to wind farms. When it replied to the complainant, it was still awaiting the reply of the Irish authorities. Its decision to await that reply before deciding on whether it would take further action is also reasonable. The Commission committed no manifest error of assessment when it took that decision[10].

[10] It must be borne in mind that, in accordance with settled case-law of the CJEU, the Commission enjoys wide discretion in deciding when and how to act in its capacity as Guardian of the Treaties, in accordance with Article 258 TFEU. Citizens are not parties to infringement proceedings and thus have no right to

26. In light of the foregoing, the complainant's allegation that the Commission has failed to reply in a satisfactory manner to its complaint against Ireland, concerning its compliance with the provisions of EU law on the planning of wind farms in Ireland, cannot be sustained.

Conclusion

On the basis of the inquiry into this complaint, the Ombudsman closes it with the following conclusion[11]:

There was no maladministration in the Commission's conduct.

The complainant and the Commission will be informed of this decision.

Marta Hirsch-Ziembińska
Head of Inquiries and ICT - Unit 1

Strasbourg, 13/01/2017

require the Commission to adopt a particular position. See Judgment of the Court of Justice of 14 February 1989, *Star Fruit v Commission*, 247/87, ECLI:EU:C:1989:58, paragraph 11; and Judgment of the Court of Justice of 17 May 1990, *Sonito and others v Commission*, C-87/89, ECLI:EU:C:1990:213, paragraph 6.

[11] Information on the review procedure can be found on the Ombudsman's website: http://www.ombudsman.europa.eu/en/resources/otherdocument.faces/en/70669/html.bookmark